

REMARKS/ARGUMENTS

Claims 1-20 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims 1-16 of U.S. Patent No. 6,675,501.

Claims 1-20 are cancelled and new claims 21-37 have been added to the application. In anticipation of a double patenting rejection of the new claims, a terminal disclaimer is submitted herewith to obviate this rejection.

Claims 1-20 stand rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. In particular, the Examiner has questioned how the intermediate member can have raised cushioning elements located on the upper surface and then the cover conforms to the upper surface of the intermediate member. All of the new claims 21-37 recite that the cover member conforms substantially to the shape of the upper surface of the intermediate member and to the plurality of raised cushioning elements thereof, thereby obviating this rejection.

Claims 1-4, 6-12, 15-18 and 20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over *Vermeulen* 4,223,455 in view of *Argyris* 5,799,413 and *Potter et al* 5,755,001 or *Goodwin et al* 5,993,585. The Examiner states that *Vermeulen* discloses substantially all the limitations of the claims including a combination of a base 30 with an intermediate member 20 located upon the base and a cover 22 located on top of the intermediate portion, the base having perforations 26, the intermediate portion having a plurality of raised cushioning elements 32 extending from a surface, the base being flat, the intermediate member being formed of a foam, and an upper secured to an outsole. The Examiner admits that *Vermeulen* does not disclose the intermediate member having a plurality of raised cushioning elements on the upper surface or a

cover member surrounding the intermediate member to conform to the shape of the upper surface and raised elements thereof and extending beneath the base member.

It is noted that the air chambers 32 of *Vermeulen* are located on the lower surface of the air chamber member 20 and extend downwardly therefrom into the alveoli 26 in the mid-sole 18. There is no teaching or suggestion in *Vermeulen* of an intermediate member being formed of a foam with a plurality of raised cushioning elements on the upper surface thereof, and a flexible cover member surrounding the intermediate member to conform substantially to the shape of the upper surface and raised elements thereof, as called for in all of Applicant's new claims 21-37 that have been added to replace the cancelled claims 1-20.

More specifically, claims 21-26 and 32-36 recite an insole construction or an article of footwear wherein the raised cushioning elements of the intermediate member have a height of approximately 6 millimeters above the upper surface of the intermediate member and are substantially uniformly spaced on the upper surface at a spacing of approximately 10-30 millimeters. Claims 27-31 and 37 recite an insole construction or an article of footwear wherein the intermediate member has a thickness of approximately 6 millimeters and the raised cushioning elements have a height of approximately 6 millimeters above the upper surface of the intermediate member. All of the claims also call for the flexible cover member conforming substantially to the shape of the upper surface and the raised cushioning elements of the intermediate member.

Applicant's foam intermediate member and the raised cushioning elements or "moguls" thereof being of a relatively large size and spacing enable the foot of the wearer to "sink" into the cover and intermediate members for comfort and to prevent it from slipping thereon. This novel

construction is not taught or suggested by Vermeulen or any of the other references cited by the Examiner.

The Examiner states that Vermeulen teaches that the height and distance between the air chambers 32 can be varied and thus could be spaced apart 10-30 millimeters and have a height of approximately 6 millimeters. First, the air chambers 32 of Vermeulen are completely different in location, construction and purpose from the raised cushioning elements of Applicant's invention. Second, the only specific examples of size or spacing set forth in Vermeulen are as follows:

1. The spacing between the air chambers 32 is preferably 2-4 millimeters (Col. 5, lines 32-34);
2. The air chamber member 20 is preferably about one-half millimeter in thickness (Col. 5, lines 35-37); and
3. The depth of the air chambers 32 vary between 1-2 centimeters (Col. 5, lines 44-47).

These specific dimensions set forth in Vermeulen are significantly different from the dimensions set forth in new claims 21-37 for the height and spacing of the raised cushioning elements and the thickness of the intermediate member. Accordingly, it is apparent that Vermeulen fails completely to render obvious or even suggest the novel recitations in Applicant's claims.

Argyris was cited by the Examiner as disclosing an innersole 10 with rounded, raised lugs 12 on the upper surface thereof and a cover member 14 covering the lugs and conforming to the shape of the upper surface thereof. Perforations 15 extend through the lugs and the cover member to allow air to be aspirated through the innersole when walking. According to the disclosure of Argyris, the lugs 12 are closely spaced and are formed of plastic or rubber. It is noted that the lugs 12 and base 11 must be formed of a relatively firm elastic material in order to

allow air to flow through the perforations and to provide the massage-like effect on the feet as described in Argyris (Col. 3, lines 24-30)..

In Applicant's insole construction and footwear article, on the other hand, the intermediate member is formed of foam and the raised cushioning elements are of a relatively large height, size and spacing to enable the foot of the wearer to "sink" into the intermediate member and to prevent it from slipping thereon. This construction is significantly different from that of Argyris where the lugs are closely spaced and must be relatively firm to keep the perforations open and to provide the described massage-like effect. It is obvious from the drawings of Argyris that the lugs 12 disclosed therein are significantly different from the raised cushioning elements 18 of Applicant's insole construction. There is no disclosure or suggestion in Argyris of Applicant's novel insole construction or footwear article using a foam intermediate member and relatively large, raised cushioning elements that are spaced to surround the foot of the wearer, as recited in claims 21-37. Accordingly, Argyris fails to supply the deficiencies of Vermeulen with respect to the novel limitations in Applicant's claims.

The Potter et al and Goodwin et al references were cited by the Examiner as disclosing a cover member for an insert that can enclose the insert and allow it to be removed as a whole and replaced. Both of these references disclose shoe sole constructions utilizing gas filled bladders which are very different from Applicant's insole construction and footwear article both in construction and intended use. Potter et al and Goodwin et al fail to add anything of significance to the teachings of Vermeulen and Argyris with respect to the novel limitations in Applicant's claims.

Applicant's novel insole construction and article of footwear fills a long felt need for a more comfortable and stable insole and shoe that clearly was and is not obvious to one skilled in

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the art. There is no disclosure or suggestion whatsoever in any of the cited references of Applicant's novel construction utilizing the foam intermediate member and raised cushioning elements specifically recited in claims 21-37. It would require hindsight on the part of the Examiner, after reviewing Applicant's disclosure, to arrive at the conclusion that the claimed novel features of Applicant's insole or footwear article would be obvious to one skilled in the art in view of the very different teachings of the cited references.

The patent to Kramer was cited against claim 14 by the Examiner for its disclosure of soft and compressible inserts 40 and 41 in the base member. Other than this disclosure, Kramer fails to supply any of the deficiencies of the other cited references with respect to the novel limitations in the new claims 21-37.

Finally, Polegato was cited against claims 5, 13 and 19 by the Examiner for its teaching of perforations and an upstanding rim in the upper surface of the outsole. Other than this feature, Polegato fails to disclose or suggest any of the novel limitations in the new claims 21-37.

In view of the above amendments and remarks, it is submitted that new claims 21-37 clearly are allowable to Applicant and formal allowance thereof is earnestly solicited.

Respectfully submitted,

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